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CC Docket #96-98

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July 24, 1998

ex parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation
CCB/CPD 97-30

Dear Ms. Salas:

On behalf of BellSouth Corporation, Albert Halprin and Kevin McGilly met yesterday, July 23, 1998, with Mr. James Schlichting, Deputy Chief of the Common Carrier Bureau, to discuss the above-captioned proceeding and possible future Commission proceedings. We reiterated the views expressed in BellSouth's reply comments in the proceeding regarding the jurisdictional nature of Internet communications. We also submitted the attached drafts and materials.

Sincerely,

Albert Halprin

cc: James Schlichting
Robert Blau

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Clarification of the Commission's	)	CCB/CPD 97-30
Rules Regarding Reciprocal	)	
Compensation For Information	)	
Service Provider Traffic	)	

Declaratory Ruling

I. Introduction

1. It is the policy of the United States, as established by Congress in the Telecommunications Act of 1996, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[1/] In this Order, we take two steps that we believe are essential to further this policy. First, we clarify that all Internet communications are jurisdictionally interstate in nature and therefore subject to this Commission's exclusive jurisdiction under the Communications Act of 1934, as amended (the "Communications Act"). Second, we determine that local exchange carriers ("LECs") that serve Internet Service Providers ("ISPs") are not, as a matter of law, entitled to reciprocal compensation under Section 251(b)(5) of the Communications Act for Internet communications that originate on the network facilities of another LEC within the same local service area.

1/ 47 U.S.C. § 230(b)(2).

2. Furthermore, while we intend to ensure that LECs are properly compensated for the costs they incur to carry Internet communications that originate on the network facilities of another LEC within the same local area, we tentatively conclude that it would be inappropriate for the Commission, acting within its jurisdiction over local networks when used to transmit interstate communications, to require the payment of reciprocal compensation as mandated under Section 251(b)(5) for such traffic. In light of the comments in this proceeding, we are concerned that extending the Section 251(b)(5) reciprocal compensation regime to such traffic could be inconsistent with the development of competition in the local exchange services market, which is a core objective of the Telecommunications Act of 1996 and of the Commission. Applying reciprocal compensation obligations to Internet communications also could cause significant economic distortions in the still-evolving information services industry, and create disincentives for investment and innovation in the underlying networks that support the Internet.

3. We stress that while we tentatively conclude that reciprocal compensation pursuant to local interconnection agreements is an inappropriate way to compensate a LEC for carrying calls to the Internet that are placed through ISPs it serves, we stress our commitment rapidly to adopt an appropriate mechanism to ensure that LECs are fully compensated for such calls. We intend to initiate a rulemaking proceeding to implement such a mechanism on an expedited basis.

4. We believe that the issues addressed in this Order underscore the need for a coherent and consistent national -- and indeed international -- policy approach to the Internet. New regulatory issues and controversies are virtually certain to arise in the future as the

Internet and Internet use continue to expand and evolve. A comprehensive, predictable, consistent and simple policy framework would minimize the incidence of such controversies, and ensure that those issues that do arise are resolved in a manner that preserves "the competitive free market for the Internet and other interactive computer services, unfettered by Federal or State regulation." The alternative -- a piecemeal approach -- is, in our estimation, far more likely to result in regulatory intrusion and uncertainty, potentially hindering the growth of the Internet and information services industries and the rapid deployment of high speed Internet access to the American people.

5. In a companion Notice of Inquiry released today, regarding the availability of advanced telecommunications capabilities to all Americans, we propose a progressive and innovative regulatory framework that will, among other things, provide incentives for deployment of high-speed Internet access services and technologies. By clarifying that Internet communications are jurisdictionally interstate, and rejecting the imposition of inappropriate charges on Internet communications that would discourage investment in new advanced telecommunications services and technologies, this Order provides a basis for the proposals discussed in the Notice of Inquiry.

II. Background

6. This proceeding was initiated in response to a letter request received by the Common Carrier Bureau on June 20, 1997, from the Association for Local

Telecommunications Services (ALTS).[2] ALTS requested "clarification" that "nothing in the [*Interconnection Order*[3]] requires" that "calls to an Information Service Provider made from within a local calling area" be "handled differently than other local traffic is handled under current reciprocal compensation agreements in situations where local calls to [Information Service Providers] are exchanged between" incumbent LECs ("ILECs") and competitive LECs ("CLECs").[4] Specifically, ALTS asked the Bureau to declare that "calls within a local calling area to [Information Service Providers] should continue to be treated as local when an ILEC-to-CLEC hand-off is involved for the purposes of tariffs, separations, and reciprocal compensation agreements."[5]

7. On July 2, 1997, the Common Carrier Bureau issued a Public Notice requesting comment on the issues raised in the ALTS Letter, and specifically on the rights of CLECs to receive reciprocal compensation pursuant to Section 251(b)(5) of the Communications Act for the transport and termination of traffic to CLEC subscribers that are

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[2] Letter from Richard J. Metzger, ALTS. to Regina M. Keeney, Chief, Common Carrier Bureau. FCC (June 20, 1997) ("*ALTS Letter*").

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1886*, First Report and Order, 11 FCC Rcd. 15499 (1996), rev's and remanded sub. nom *Iowa Utils. Bd. v. FCC*, 109 F.3rd 418 (8th Cir. 1996), cert. granted (U.S. _).

[4] *ALTS Letter* at 1. In its request, ALTS used the acronym "ISP" for the term "Information Service Provider." In this Order, we use the acronym "ISP" for the terms Internet Service Provider."

[5] *ALTS Letter* at 8.

information service providers.[6/] More than 45 parties filed comments or reply comments on the matter.

8. On July __, 1998, ALTS withdrew its request for clarification.. However, consistent with requirements of the Administrative Procedures Act,[7/] we issue this Order, notwithstanding ALTS' withdrawal of its request, in order to "terminate a controversy" and "remove uncertainty" regarding an issue of critical importance to the establishment of a "pro-competitive, de-regulatory national policy framework," as intended by Congress in enacting the Telecommunications Act of 1996.[8/] The issue we address here -- whether LECs that serve ISPs are entitled under Section 251(b)(5) of the Commission's rules to reciprocal compensation for Internet communications that originate on the network facilities of another LEC within the same local service area -- is clearly the subject of controversy and uncertainty, and prompt resolution of the issue is clearly in the public interest.

[6/] *See FCC Public Notice*, DA 97-1399 (rel. July 2, 1997), and then extended the time for filing reply comments to July 31, 1997. On July 22, 1997, the Bureau extended the deadline for filing reply comments on the Public Notice. *See* Order, DA 97-1543. File No. CCB/CPD 97-30 (Comp. Pricing Div., CCB. rel. July 22, 1997).

[7/] 47 C.F.R. § 1.2. Section 5(d) of the Administrative Procedure Act ("APA"), codified in 5 U.S.C. § 554(e), provides that "[t]he agency, with like effect as in the case with other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." Courts have interpreted the terms "declaratory order" used in Section 5(d) of the APA and "declaratory ruling" used in Section 1.2 of the FCC Rules to be interchangeable. *See, e.g., Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996).

[8/] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

9. In the year since ALTS filed its request, at least eighteen state commissions, numerous state courts, and two federal courts have been asked to resolve this issue.[9/] These proceedings alone illustrate both the importance of the issue and the degree of controversy and uncertainty surrounding it. Moreover, in almost every one of these proceedings, the commission or court in question appears to have based its determination at least in part on an interpretation of the Commission's rules and past Commission Orders, as well as on its interpretation of the scope and meaning of the provisions of the Communications Act that govern reciprocal compensation arrangements. We recently informed a federal court that we respectfully disagreed with its interpretation of a Commission Order on which the court appeared to rely heavily in reaching its conclusions.[10/] We indicated to the court that we would shortly issue an order on the matter in this proceeding.[11/]

10. Significant sums of money, in the form of reciprocal compensation payments, are being transferred between telecommunications carriers on the basis of these state commission and court rulings. Major investment decisions and business plans apparently are being held in abeyance pending clarification of this issue by the Commission. Other investments and business plans apparently are proceeding based on differing assumptions

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[9/] *See. e.g., In Re Brooks Fiber Communications of Michigan.* Case No. U-III78 at 17 (Mich. Pub. Serv. Comm'n 1998). *Petition of the Southern New England Tel. Co. for a Declaratory Ruling Concerning Internet Service Provider Traffic,* Docket No. 97-05-22 at 11. (Comm. Dept. of Publ. Util. Control 1997). *Final Order on Petition of Cox Virginia Telecom Inc.* Case No. PUC970069 at 2 (Va. St. Corp. Comm'n 1997).

[10/] Brief for the Federal Communications Commission as Amicus Curiae, *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, et. al.*, No. MO-98-CA-43 (U.S.DC. WDTEX, filed June 23. 1998) ("*SWBT v. Texas*").

[11/] *Id.*

about how the issue will be resolved. Given that we have a complete and current record before us on the matter of CLECs' reciprocal compensation rights, it is incumbent on the Commission to eliminate the uncertainty surrounding this issue. We do not believe that delaying resolution of this issue is in the interest of any of the affected parties, in particular those parties that appear to have been proceeding on the basis of a misinterpretation of Section 251(b)(5) and/or of our rules and policies. By clarifying the rights and duties of carriers under the Communications Act and our rules, we believe that this Order will help to prevent further economic distortions or inappropriate investment decisions that may have resulted from such erroneous interpretations.

III. Comments

11. As noted above, ALTS, in its letter request, asked the Commission to "clarify" that calls to an ISP served by a CLEC that originate on the network facilities of another LEC within the same local service area should be treated as "local calls" for reciprocal compensation purposes. The Commenters fell into two clearly defined camps. CLECs and ISPs, including ISPs that have voluntarily become CLECs, supported the ALTS request and urged the Commission to order the ILECs to pay reciprocal compensation to CLECs for all such calls. On the other hand, ILECs urged the Commission to deny ATLS' request, and to declare that the calls at issue are not subject to reciprocal compensation under either the law or the Commission's rules and policies.

12. The CLECs and ISPs present two basic sets of arguments to support their contention that a CLEC that serves an ISP is are entitled to reciprocal compensation for calls

to the ISP that originate on the network facilities of another LEC within the same local service area. One set of arguments is based on a legal interpretation of Sections 251(b)(5) and 252(d)(2) of the Communications Act. These commenters contend that the calls in question are subject to Section 251(b)(5) reciprocal compensation obligations as a matter of law, because the calls "terminate" on the network facilities of the CLEC. They cite a variety of evidence to support this assertion, including language in the Commission's *Universal Service Order* that describes calls to the Internet that are placed through an ISP as consisting of two separate components; the fact that the calling party dials a seven-digit number; and the fact that the ISP is treated as an end-user for other regulatory purposes. Some of the commenters acknowledge that the Internet communication initiated by the call is jurisdictionally interstate in nature, but contend that the interstate communication is distinct from the local call to the ISP, which they claim terminates at the ISP.

13. The second set of CLEC/ISP arguments appear to acknowledge that Internet communications that are placed through an ISP do not terminate at the ISP location, or at a minimum are jurisdictionally interstate in nature. They reject ILEC arguments that they are asking the Commission to cede jurisdiction over such calls to the states. Nonetheless, these commenters argue that the Commission, acting within its jurisdiction over such interstate traffic, has determined that the calls in question are to be treated as "local calls" for purposes of reciprocal compensation. They contend that the ILECs are therefore required to pay reciprocal compensation to CLECs for all calls that are placed by an ILEC subscriber to an ISP served by a CLEC within the same local service area. In particular, these commenters argue that the Commission's determination that interstate ESPs shall be treated as end users

for interstate access charge purposes also governs the treatment of calls to ISPs for reciprocal compensation purposes. For example, ALTS stated that the "Commission has long held that local calls to [Information Service Providers] must be treated as local calls by LECs ...[12/] ALTS stated, further, that "[n]othing in the Telecommunications Act of 1996 or in the Commission's implementing rules altered any aspect of this rule."[13/]

14. These commenters note that the ILECs treat such calls as "local" for other regulatory purposes, including jurisdictional separations, ARMIS reporting, and state rate cases;[14/] charge for such calls under state tariff provisions governing local calls; and treat such calls as local under interconnection agreements with adjacent ILECs.[15/] They also argue that the Commission's exclusion of "interexchange" traffic from the scope of reciprocal compensation agreements did not include calls to ISPs. They contend that by virtue of the Commission's rule that interstate ESPs be treated as end users, local calls to ISPs are not "interexchange" for the purpose of transport and termination agreements, even though they may be interstate communications.[16/]

15. Accordingly, the CLEC/ISP commenters contend that the Commission intended that "local" calls to ISPs that are served by a CLEC be subject to reciprocal compensation, and urge the Bureau to clarify that this is the case.

12/ *ALTS Letter* at 2.

13/ *Id.* at 3.

14/ *See ALTS Reply Comments* at 2.

15/ *Id.*

16/ *Id.*

16. The ILEC commenters urge the Commission to deny or dismiss ALTS' request. The ILECs contend that the calls at issue are interstate communications and are therefore not subject to reciprocal compensation. They argue that if the Commission were to treat the calls in question as "local," it would effectively cede jurisdiction over such traffic to the states and lose its ability to regulate the rates or other terms and conditions for accessing the Internet by using the local exchange network. They contend that such calls by definition do not terminate on the network facilities of the LEC that provides local exchange service to the ISP, and therefore are not subject to reciprocal compensation under Section 251(b)(5). Furthermore, they deny that the Commission's treatment of interstate ESPs as end users for interstate access charge purposes requires that ISPs be treated as end users for reciprocal compensation purposes.

IV. Legal Analysis

17. Reduced to its essence, this proceeding raises two distinct questions: (1) Is a LEC whose local exchange service subscriber connects to the Internet by calling into an ISP that receives local exchange service from another LEC required by law to pay reciprocal compensation for the call? (2) Is the LEC in question required by a rule or policy of this Commission to pay reciprocal compensation for the call? For the reasons explained below, we answer both questions in the negative. Because these questions require us to make important determinations about the jurisdictional nature of Internet communications, and about how and to what extent the Internet fits within our existing regulatory framework, we begin with a brief description of the Internet as a foundation for our subsequent analysis.

A. The Internet

18. We have previously characterized the Internet as "a loose interconnection of networks belonging to many owners. It is comprised of tens of thousands of networks that communicate using the Internet Protocol (IP)."[17] We also explained that the Internet is

> [A] distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides.[18]

19. A working paper issued last year by the Office of Plans and Policy elaborates on these basic characteristics of the Internet:

> [B]ecause the Internet is a dynamically routed, packet-switched network, only the origination point of an Internet connection can be identified with clarity. Users generally do not open Internet connections to "call" a discreet recipient, but access various Internet sites during the course of a single conversation ... One Internet "call" may connect the user to information both across the street and on the other side of the world.[19]

20. The OPP working paper concludes that Internet traffic has "no built-in jurisdictional divisions."[20]

B. Jurisdictional Nature of Internet Communications

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[17] *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998) at ¶ 62.

[18] *Id.* at ¶ 64.

[19] *See* Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, FCC, OPP Working Paper No. 29 (March 1997) at 45.

[20] *Id.*

21. These basic features and characteristics of the Internet are critical to our determination of the jurisdictional nature of Internet communications. Under the Communications Act, this Commission has jurisdiction over interstate and foreign communication by wire and radio, while the states have jurisdiction over intrastate communication.[21] "Communication by wire" is defined as

> [T]he transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.[22]

22. The well-established standard for determining the jurisdictional classification of a communication is to analyze the communication on an end-to-end basis. We have held previously that

> [W]e regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch.[23]

23. We have similarly held that

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[21] *See* 47 U.S.C. § 152(a). There are certain very minor exceptions to the FCC's jurisdiction, such as interstate local exchanges, which are not relevant here.

[22] 47 U.S.C. § 153(51).

[23] *See Teleconnect Co. v. Bell Telephone Co. of Pennsylvania et al*, 10 FCC Rcd 1626, 1629-30 (1995) ("*Teleconnect Order*"), *aff'd, Southwestern Bell Telephone Co. v. FCC*, No. 95-119 (D.C. Cir. June 27, 1997). See also *Long Distance/USA, Inc.*, 10 FCC Rcd. 1634, at ¶ 13 ("[W]e regulate an interstate wire communication ... from its inception to its completion. ... [A] single interstate communications ... does not become two communications because it passes through intermediate switching facilities.")

> [T]he jurisdictional nature of a call is determined by its ultimate origination and termination, and not ... its intermediate routing.[24/]

24. The federal courts have confirmed that the jurisdictional classification of a communication depends on the "nature" of the communication and is to be analyzed from the point of inception to the point of completion.

> That the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion is confirmed by the language of the statute and by judicial decisions.[25/]

25. Nothing in the Telecommunications Act of 1996 altered the basis for determining the jurisdictional nature of traffic.

26. In a traditional circuit-switched network, the jurisdictional status of a call is simple to determine: if the call originates and terminates in a single state, it is jurisdictionally intrastate. If the points of origin and termination are in different states (or different countries), the call is jurisdictionally interstate. In the packet-switched network environment of the Internet, the jurisdictional analysis is less straightforward. An Internet communication does not necessarily have a point of "termination" or "completion" in the traditional sense used by the Commission and the courts. As noted above, an Internet user typically communicates with more than one "destination point" on (or beyond) the Internet during a single Internet communication, and may do so either sequentially or simultaneously. In a

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[24/] *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560 Revisions to Tariff F.C.C. No. 68*, Order Designating Issues for Investigation, 3 FCC Rcd. 2339 (1988) at ¶ 26. *see* also, *AT&T; Applicability of the ENFIA Tariff to Certain OCC Services*, 91 F.C.C. 2d 568 (1982) at 576.

[25/] *See United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y.), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945)(per curiam).

single Internet communication, for instance, a caller may access websites that reside on servers located in various states or in foreign countries; communicate directly with another Internet user, by voice, video or electronic messaging; and "chat" online, in real time, with a group of Internet users located around the corner or around the world. Standard Internet "browsers" enable callers to do all of these things simultaneously. In another example, the end user may download incoming e-mail from the ISP's server (located in the same state) while accessing her stockbroker's website (located in another state), and listen to an audio feed that originates from a radio station in another country. The communication may, and typically does, continue after the user ceases to communicate with a particular destination point. In many respects, jurisdictional analysis of the Internet resembles that of private line networks. Where individual use (which may be within a state or between states) is neither measured (and, perhaps, is not measurable) nor recorded. This led to the development of the so-called "contamination of theory" discussed below. Nonetheless, to the extent that an Internet communication can be said to have a point of "completion," it is the destination point or points the end user reaches during the call.

27. Some of the destinations the caller communicates with may be located within the same local exchange, calling area, or state, and some may be located in another state or country. Because of the nature of the Internet, it is often impossible for a user to know the location from which he or she is retrieving information. Today, the contents of popular websites are stored in multiple servers throughout the Internet, based on techniques referred to as "caching" or website "mirroring." The use of these techniques is growing very rapidly.

As a result, the precise location of the server may be unknown to the caller or even to the ISP he uses as part of accessing the Internet.

28. And as also noted, the precise location of the destinations the end user communicates with may be unknown and unknowable to the end user or the ISP through which she gains access to the Internet.

29. Our Orders and court decisions establish that where a facility is used to provide both intrastate and interstate services, and it is not possible to "separate" the uses of the facility by jurisdiction, such "mixed-use" facilities are subject to the FCC's exclusive jurisdiction.[26/] For instance, we have determined that private lines used to carry both intrastate and interstate traffic are a mixed-use facility.[27/]

30. Given the nature and current uses of the Internet, it is not possible to identify or separate most ISP traffic by jurisdiction. It is not possible to separate the intrastate and interstate portions of a call in which an end user communicates with multiple destinations, some of which may be within the same state, and some of which may be in other states or countries. It is not possible to separate the intrastate and interstate portions when the end user is simultaneously engaged in intrastate and interstate communication over the Internet. Forwarding and framing technology itself prevents the originating ISP or router from knowing the ultimate "destination" of many communications. And it is not possible to

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[26/] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660 (1989).

[27/] Because no rational basis exists to allocate the costs of a dedicated circuit between the jurisdictions, the FCC determined that a private line that carries more than a de minimis amount of interstate traffic (*i.e.*, more than 10% of the total traffic carried on the line) will be treated for separations purposes as interstate.

determine whether the call is intrastate or interstate when the location of the destination point is unknown.

31. We therefore conclude that the Internet is a mixed-use facility, and that Internet communications are jurisdictionally inseverable. We have previously determined that jurisdictionally inseverable traffic is interstate traffic subject to the Commission's exclusive jurisdiction. Accordingly, we conclude that all Internet communications are jurisdictionally interstate and subject to our exclusive jurisdiction.

32. Pursuant to well-established Commission and court precedents, we conclude that our jurisdiction over Internet communications applies to such communications on an end-to-end basis. To the extent that the local network facilities of one or more LECs are used to originate an Internet communication, such facilities are an interstate use and are subject to our jurisdiction. "This Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with origination and termination of interstate calls."[28/] While the unique nature of the Internet renders the point of "termination" of an Internet communication somewhat ambiguous, the point of origination of such a communication is clearly the end user who initiates the communication. Where the end user initiates the communication by dialing into an ISP over the network facilities of one or more LECs, these network facilities are in interstate use.

33. Several commenters explicitly or implicitly urge the Commission to find that Internet communications that are established through an ISP constitute "two calls" or two

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[28/] *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992) ("*MemoryCall Order*") at 1621.

components: a jurisdictionally intrastate "local" call from the end user to the ISP, and an information service from the ISP to the remainder of the Internet, which may be jurisdictionally interstate.[29/] We have consistently rejected attempts to divide interstate communications into "two calls," both in the context of enhanced or information services[30/] and telecommunications services.[31/]

34. For instance, in the MemoryCall case, the Georgia Commission argued that "when the voice mail service is accessed from out-of-state, two jurisdictional transactions take place: one from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate."[32/] We disagreed, concluding that because "there is a continuous, two-way transmission path from the caller location to the voice mail service, there could be but a single call." We concluded, further, that the service in question was jurisdictionally inseverable and preempted the state agency order. Similarly, an Internet communication that is placed through an ISP can establish a clear, real-time communication between the end user who initiates the communication and the destination point or points he or she is seeking to reach on or beyond the Internet.

35. Several commenters cite a statement in our *Universal Service Order*, that "Internet access consists of more than one component," in support of their contention that a

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29/ *See, e.g., ALTS Letter* at 6.

30/ *See MemoryCall Order*.

31/ *See Teleconnect Order* at 1629-1630.

32/ *See MemoryCall Order* at 1620.

call to an ISP is separate for jurisdictional and reciprocal compensation purposes from the "information service component" provided by the ISP. We note that several of the state commissions and courts that have addressed the issue of whether reciprocal compensation obligations apply to ISP traffic appear to have relied at least in part on this statement in our *Universal Service Order*, in making their respective determinations. One federal court has addressed the issue of whether calls to ISPs are subject to reciprocal compensation. The U.S. District Court for the Western District of Texas - Midland-Odessa Division recently upheld a Texas Public Utilities Commission decision finding that "calls to ISPs are 'local,' and not interstate," and ordering Southwestern Bell Telephone Company (SWBT) to pay reciprocal compensation for "local" calls from its end user customers to ISPs that receive local exchange service from CLECs that compete with SWBT.[33/] This court also relied heavily on the discussion of Internet access in our *Universal Service Order*, citing it in support of its conclusion that "the FCC appears to define the very nature of Internet connections differently from interstate long distance calls."[34/] The court stated that "[c]ontrary to the FCC's treatment of voice mail and other telephone services, the FCC has not explicitly categorized Internet use via local phone connections as a single end-to-end communication."[35/] We do so here.

33/ *See, SWBT v. Texas*, decided June 16, 1998.

34/ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*").

35/ *See SWBT v. Texas*.

36. In our *Universal Service Order*, we distinguished between the "telecommunications component" and the "information component" of end-to-end Internet access and use for purposes of determining which entities will be required to contribute to the new federal universal service support mechanism.[36/] We did not, nor could we, disturb the established rule of law that the jurisdictional nature of a communication is determined on an end-to-end basis, from the point of origin to the point of completion.

37. Moreover, were the Commission to follow the commenters' proposed approach, the same premise necessarily would apply to all interstate enhanced services. No basis exists to treat the "local" portion of calls to the Internet -- i.e., the portion between the end user and the ISP -- as subject to state jurisdiction and to reciprocal compensation, while continuing to treat "local" calls to interstate ESPs, including voice mail and information services, as part of an end-to-end interstate communication that is subject to the Commission's jurisdiction. Were we to follow the commenters' suggestion, we would thus cede the jurisdiction it now has over local exchange network facilities and services to the extent they are used to provide intestate enhanced services. This would thwart the Commission's ability to continue implement its policies favoring the development of interstate enhanced services.

38. The Commission asserts and exercises jurisdiction over interstate enhanced services on an end-to-end basis, from the point of origin of the call to such a service to the point of completion or termination of the call. This approach has been upheld by the courts and it is the approach we take here.

[36/] *Id.*

39. Under this extensive body of precedent, for purposes of jurisdictional analysis an Internet communication is a single end-to-end communication, beginning at its point of inception on the network facilities of the LEC serving the end user who initiates the communication. We clarify that an "Internet communication" is established when the end user who initiates the communication is assigned an Internet Protocol (IP) address.[37/] This "bright-line" definition will lend clarity to the determination of which calls to ISPs are Internet communications and therefore interstate.[38/]

40. We also note that the Commission's jurisdiction over other interstate services that resemble in some respects calls to an ISP is clearly established. For example, interstate foreign exchange ("FX") service involves the end user dialing a seven-digit telephone number. In addition, FX service subscribers predominantly, or exclusively, receive, rather

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[37/] An end user either has a "static" or permanent IP address, which is used every time he or she logs onto the Internet, or is assigned a "dynamic" IP address by the ISP each time he or she places a call into the Internet. An IP address is required to fully access the Internet. It allows a user to post information, access information at other addresses, or exchange information with another user. IP addresses are composed of a string of numbers. In order to smooth the transfer of information, a user will often attach an alphanumeric "domain name" to his or her IP address.

[38/] We clarify that our determination regarding the jurisdictional nature of calls to ISPs applies only to Internet communications placed through an ISP -- i.e., where an IP address is assigned to the end user. Other calls to ISPs, where an IP address is not assigned, may or may not be jurisdictionally interstate or intrastate, depending on the origin and termination of the call. For instance, a call in which the end user only accesses information in a database stored on the ISP's own server, and does not use any other, *See William Thomas, et.al., v. Network Solutions, Inc. and National Science Foundation*, Cir. No. 97-2412, slip. op., (D.D.C. decided April 3, 1998), interstate service during the call may be jurisdictionally intrastate. If the end user and the ISP's server containing the database are located in the same local service area, the call may also be subject to reciprocal compensation under local interconnection agreements.

than transmit, traffic. The Commission's jurisdiction over such services is unquestioned. Several commenters emphasize the fact that end users typically call into ISPs by dialing a seven-digit "local" telephone number. To the extent that these commenters contend that calls to an ISP are jurisdictionally intrastate by virtue of the fact that they are placed by dialing a seven-digit sequence, we disagree. As noted above, FX service frequently involves the use of a seven-digit dialing sequence. When provided on an interstate basis, FX service is subject to this Commission's jurisdiction, and pursuant to our rules, is regulated as an interstate interexchange service subject to access charges.

41. For all of these reasons, we conclude that our jurisdiction over Internet communications extends from the point of inception of such communications. Local network facilities that are used in conjunction with the origination of Internet communications are in interstate use, and this Commission has jurisdiction over, and regulates charges for, the network facilities of a LEC when used in conjunction with the origination of Internet communications.

V. Application of Statutory Reciprocal Compensation Obligations

42. As noted above, one of the basic questions raised in this proceeding is whether a LEC that serves an ISP is entitled as a matter of law to reciprocal compensation pursuant to Section 251(b)(5) of the Communications Act for calls to the ISP that originate on the network facilities of another LEC within the same local service area. Section 251(b)(5) requires all LECs "to establish reciprocal compensation arrangements for the transport and

termination of telecommunications."[39] Section 252(d)(2) specifies that such reciprocal compensation arrangements must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[40]

43. Thus, under the plain language of the statute, Section 251(b)(5) reciprocal compensation obligations apply only to traffic that originates on the network facilities of one LEC and terminate on the network facilities of another LEC. We conclude that Congress intended that Section 251(b)(5) apply specifically to traffic that originates and terminates within a local service area, as defined by the relevant state commission.

44. Our analysis of the jurisdictional nature of Internet communications, in Section IV, above, essentially resolves the legal question at issue here. Internet communications that are placed through an ISP do not terminate on the network facilities of the LEC that serves the ISP, and therefore are not subject to reciprocal compensation under Section 251(b)(5). For example, none of the following terminates locally: Internet "chat" services, voice services offered over the Internet, and audio and video streaming services (including all FCC meetings that are "broadcast" to the world over the Internet). Because all Internet communications that are placed through an ISP are jurisdictionally interstate in nature, they are not subject, as a matter of law, to the reciprocal compensation requirements of the Communications Act.

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[39] 47 U.S.C. § 251(b)(5).

[40] 47 U.S.C. § 252(d)(5).

45. Our conclusions in this Order apply to all Internet communications that are placed through an ISP, which are inherently interstate in nature and are therefore not subject to reciprocal compensation under Section 251(b)(5). Because they are a paradigm case of "inseverability," we have concluded that we must prohibit all state attempts to regulate such calls as inconsistent with the current regulatory scheme as well as those which may be adopted in our companion proceeding on the availability of advanced telecommunications capabilities to all Americans.

46. Several commenters stated that ILECs treat calls to ISPs that are served by adjacent LECs as "local" calls under interconnection agreements with adjacent ILECs. We clarify that LECs are required to treat calls that they exchange with adjacent LECs the same for purposes of interconnection agreements and reciprocal compensation obligations as they treat calls that they exchange with CLECs, including calls to the Internet that are placed through an ISP served by an adjacent LEC.

VI. Application of Reciprocal Compensation to Internet Communications

47. Having determined that a LEC whose local exchange service subscriber initiates an Internet communication by calling into an ISP that receives local exchange service from another LEC is not required by law to pay reciprocal compensation for the call, we turn to the second basic question raised in this proceeding: whether the LEC in question is required by a rule or policy of this Commission to pay reciprocal compensation for the call. ALTS, supported by numerous CLEC and ISP commenters, cited various arguments in support of the proposition that LECs are required to treat such a call as "local" traffic for reciprocal compensation purposes. In particular, these parties note that under the Part 69

access charge rules, the Commission has required that interstate ESPs be treated as end users for interstate access charge purposes. They further note that calls to ISPs served by a CLEC that originate on the network facilities of another LEC within the same local service area are treated as "local" traffic for other regulatory purposes as well, including the jurisdictional separations process. From these facts, they discern a rule or policy under which we currently require that reciprocal compensation under interconnection agreements apply to such traffic.

48. We reiterate that because Internet communications are jurisdictionally interstate, we have the authority to regulate the charges for the use of LECs' local network facilities to connect to the Internet through an ISP. While it would be within our discretion to require that such uses of the local network be compensated in a manner similar to or based upon the reciprocal compensation requirements of Section 251(b)(5). We have imposed no such requirement, and in light of the record in this proceeding, no persuasive basis to impose such a requirement appears to exist.

49. Our part 69 rules establish only two classes of entity for interstate access charge purposes: interstate carriers and end users. While we have periodically examined the possibility of establishing other categories under Part 69, we have not as yet done so. Given this dichotomy, the Commission in 1983 determined that interstate ESPs should be treated as end users rather than interexchange carriers for interstate access charge purposes. In our recent notice of inquiry in the Internet Proceeding, we tentatively concluded that interstate